(N. S.) 608; *Bogie* v. *Bogie,* 41 Wis. 209. While it is thus generally agreed that the grantor is entitled to some relief, there is much uncertainty and confusion among the cases as to the kind of relief which should be granted.

Probably the most adequate and generally accepted doctrine is to consider the provision as a condition subsequent a breach of which will defeat the estate granted. *Glocke* v. *Glocke,* 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; *Britton* v. *Taylor* (N. C.), 84 S. E. 280. But some cases refuse to consider such a provision in this light, because of the general rule that conditions subsequent will not be implied since they tend to defeat the estate. *Lowman* v. *Crawford,* 99 Va. 688, 40 S. E. 17.

Of course, where the grantee is guilty of fraud, either actual or constructive, in obtaining the conveyance, it will be set aside. *Gore* v. *Sumersall,* 5 T. B. Mon. (Ky.) 505. And where the agreement is fraudulently made by the grantee with no intention of performing it, the conveyance will be set aside in equity. *Wampler* v. *Wampler,* 30 Gratt. (Va.) 454; *Spangler* v. *Yarborough,* 23 Okla. 896, 101 Pac. 1107, 138 Am. St. Rep. 856. And in some jurisdictions, the deed will be cancelled for the breach of the condition on the broad ground that a denial of such relief would perpetrate a fraud on the grantor, and that it would be against equity and good conscience to allow the grantee to keep the land. *Diggins* v. *Doherty,* 4 Mackey (D. C.) 172; *Reid* v. *Burns,* 13 Ohio St. 49.

Some cases hold that, since equity looks to the substance rather than to the form of such agreements, where the grantee refuses to perform his promise it is as if the grantor received nothing for his land, and that equity will cancel the deed and restore the parties to their former position. *Haataja* v. *Saarenpaa,* 118 Minn. 255, 136 N. W. 871; *Lane* v. *Lane,* 106 Ky. 530, 50 S. W. 857. *Contra, Dickson* v. *Milling,* 102 Miss. 449, 59 South. 804, 43 L. R. A. (N. S.) 916. And it has also been held that such a promise creates a continuous obligation on the part of the grantee, in the nature of a trust, for the breach of which there is no adequate remedy at law. *Grant* v. *Bell,* 26 R. I. 288, 58 Atl. 951; *Patterson* v. *Patterson,* 81 Iowa 626, 47 N. W. 768.

Yet some courts refuse to cancel the deed, and content themselves with giving other relief, even though it is inadequate. Thus, it has been held, though there are cases to the contrary, that such a provision in a deed constitutes a lien on the land. *Pownal* v. *Taylor,* 10 Leigh. (Va.) 172; *Whitaker* v. *Trammell,* 86 Ark. 251, 110 S. W. 1041. See *contra, Grant* v. *Swank* (W. Va.), 81 S. E. 967, L. R. A. 1915B, 881. Or that it is an equitable mortgage. *Abbott* v. *Sanders,* 80 Vt. 179, 66 Atl. 1032, 13 L. R. A. (N. S.) 725, 130 Am. St. Rep. 974, 12 Ann. Cas. 898. Still other courts confine the grantor's right to an action at law to recover damages for the breach of the agreement. *Gardner* v. *Knight,* 124 Ala. 273, 27 South. 298. Because of the personal nature of the services and the difficulty of determining what constitutes a proper performance, specific performance will not be decreed. *Gardner* v. *Knight, supra.*

EVIDENCE — ADMISSIBILITY — CONTEMPORANEOUS PAROL AGREEMENT.—Defendants borrowed money from plaintiff association, executing two

mortgages absolute on their face to secure the indebtedness, with a parol agreement that the second mortgage was not to be paid until after the first was paid by the maturing of certain stocks. Judgment was obtained on the second mortgage before the stipulated time, and this action is brought to vacate the judgment. *Held,* the parol agreement can be shown to vacate the judgment. *Excelsior Saving Fund & Loan Ass'n* v. *Fox* (Pa.), 98 Atl. 593.

The decision in the instant case is in accord with a long line of Pennsylvania cases holding that a contemporaneous parol agreement inducing the execution of a written instrument is admissible to vary, change or contradict the terms of the instrument. *Greenawalt* v. *Kohne,* 85 Pa. St. 369; *Gandy v. Weckerly,* 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.), 434; *Croyle* v. *Cambria, etc., Co.,* 233 Pa. 310, 82 Atl. 360. This rule, which would seem to be unsound on principle, has apparently arisen from a disregard of the distinction between fraud in its broad sense and fraud in its legitimate narrow sense. "Fraud" must here be understood in its legitimate narrow sense, *i. e.,* a misrepresentation of a present or past fact. It is obvious that an intent not to perform a promise, or a subsequent failure knowingly to perform an extrinsic agreement not embodied in the writing, cannot in strictness be legally included in the term "fraud." It seems to be a disregard of this distinction that is in part responsible for the anomalous attitude of the Pennsylvania court towards the general rule. 4 WIGMORE, EV., § 2439.

The great majority of American decisions is in conflict with the rule adopted by the Pennsylvania court, most courts preferring to adhere more closely to the rigorous common law doctrine laid down by the English courts that parol evidence is not admissible to vary the legal import of a written instrument. *Stevens* v. *Cooper,* 1 John. Ch. (N. Y.) 425. Thus, parol evidence is inadmissible to show a contemporaneous oral agreement by one surety to indemnify his co-surety for any loss he might suffer on account of the principal's failure to pay a note unconditional on its face. *Towner* v. *Lucas,* 13 Gratt. (Va.) 705. And, where the insured sued on an insurance policy, seeking to overcome a clause whereby the insurer should be released from liability on the policy in case the insured failed to pay the premiums, he can not prove a contemporaneous parol agrement by the company to give due notice of the time for the payment of the premiums. *Insurance Co.* v. *Mowry,* 96 U. S. 544. Parol evidence is inadmissible to show a verbal agreement between the maker and the payee of a note that the payee would hold the note as an asset of the bank and that it would never be put in circulation. *Jackson* v. *Chemical Nat. Bank* (Tex. Civ. App.), 46 S. W. 295. And, where the plaintiff induced his debtor's wife to sign a note jointly with him by telling her that she would not be required to pay it, parol evidence is not admissible to show the agreement in order to defeat her liability on the note. *Duty* v. *Sprinkle,* 64 W. Va. 39, 60 S. E. 882.

It would seem, therefore, that failure to keep representations of future intention and false promises made at the time of the execution of the written instrument are not sufficient to justify a contradiction or

reformation of the instrument on the ground of fraud. To so hold, would open the door to fraud in innumerable cases, and negative the usefulness of written instruments, as each would have to run the gauntlet of "slippery memory" and actual misrepresentation.

FRAUD—CONCEALMENT—OBLIGATION TO DISCLOSE FACTS.—The plaintiff agreed to a settlement and release of all interest in the estate of her deceased father in reliance upon the representations of the defendant's lawyer, who failed to divulge certain facts that would have materially affected her decisions with regard to the advisibility of such an agreement, and who also made certain affirmative representations calculated to give her an erroneous impression of the facts. *Held*, the agreement is not binding. *Brager* v. *Friedenwald* (Md.), 97 Atl. 515.

Where one is under no legal obligation to speak, his silence or the nondisclosure of a material fact will not justify rescission of the contract by the other party. *Harris* v. *Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; *Smith* v. *Beatty*, 37 N. C. 456, 40 Am. Dec. 435. This was so held where the defendant had let a house to the plaintiff, which he knew was required for immediate occupation, without disclosing the fact that it was in a ruinous condition, and without any warranty either express or implied with regard to it. *Keates* v. *Lord Cadogan*, 10 C. B. 591.

But a distinction must be made between these cases and those in which the facts concealed are peculiarly within the knowledge of the person concealing them, and which, under the circumstances, he is bound in good faith to disclose; as where the defendant sold to the plaintiff cattle that were suffering from a latent disease, the existence of which was known to the defendant at the time of the sale, but not disclosed to the plaintiff. See *Fitzhugh* v. *Nirschl* (Ore.), 151 Pac. 735.

And if the silence or nondisclosure renders false that which may have been truly stated, and the suppression of the facts is therefore calculated to convey a false impression, an action for fraud will lie. *Lomerson* v. *Johnston*, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410; *Kronfeld* v. *Missal* (Conn.), 89 Atl. 95. See *Peek* v. *Gurney*, L. R. 6 H. L. 377, 407. Thus, the buyer was allowed to recover damages for the seller's false representations where the government survey of certain property showed, to the knowledge of the defendant, a discrepancy in acreage from the number stipulated in the deed given by him to the plaintiff describing the land as a certain quarter section containing 160 acres, more or less, as shown by the government survey. *Miller* v. *Wissert*, 38 Okla. 808, 134 Pac. 62.

Nondisclosure or concealment is equivalent to false representation where active steps are taken to prevent a discovery of the facts concealed. *Crompton* v. *Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.), 748, Ann. Cas. 1912A, 399. Thus, where the defendant had discovered a remarkable cave formation under property for the purchase of which he was negotiating, a rescission of the sale was permitted because he had attempted to conceal the entrance with brush in order that the plaintiff might not become aware of its actual value. *Merchants Bank* v. *Campbell*, 75 Va. 455.